United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2165

To Be Argued by
ROY M. COHN

In the United States Court of Appeals
For the Second Circuit

JOSEPH DEL VECCHIO,

Petitioner-Appellant,

- against -

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF FOR PETITIONER-APPELLANT

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1. Whether the lower court, at the time of accepting the appellant's plea, properly complied with Rule 11.

2. Whether the lower court, at the time of accepting appellant's plea, erred in not advising the appellant of the existence of mandatory special parole, its nature, and the existence of a mandatory minimum sentence.

3. Whether the lower court, in acting upon the instant application, failed to follow proper procedure.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

JOSEPH DEL VECCHIO,

Petitioner-Appellant,

- against -

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM A MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the memorandum and order of the Honorable Kevin Thomas Duffy, Judge of the United States District Court for the Southern District of New York dated November 12, 1976 (5a)*. Said order denied appellant's petition for relief pursuant to 28 U.S.C. §2255.

It is appellant's contention that at the time of the entry of his plea to Indictment No. 73 Cr. 1099 (11a), he was not accorded his rights pursuant to Rule 11 of the Federal Rules of Criminal Procedure (hereinafter referred to as F.R.Cr.P. 11). Specifically, appellant was not advised:

1. that he was susceptible to a term of special parole upon sentencing;
2. as to the nature of the special parole;
3. that he was not eligible for parole upon sentencing (i.e., that there was a minimum mandatory sentence).

Furthermore, appellant submits that the court below did not follow the mandatory procedure in determining his application for relief pursuant to 28 U.S.C. §2255.

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*Page references followed by the letter "a" denote pages in appellant's Appendix.

STATEMENT OF FACTS

The appellant initially pled guilty to seven counts of a multi-count indictment (73 Cr. 1099) on January 14, 1974, before the Honorable Kevin Thomas Duffy (12a). The appellant pled to conspiring to possess, facilitate and distribute narcotics, and substantive counts attendant thereto. (21 U.S.C. §§173, 174, 812, 841(a)(1) and 841(b)(1).) On May 20, 1974, the appellant was sentenced to a term of imprisonment of 15 years and a special parole term of three years to commence upon completion of his imprisonment.

Prior thereto, the appellant was sentenced to a term of three years imprisonment by the Honorable Inzer B. Wyatt. This initial term commenced in July, 1973, and has been concluded (9a). The appellant is presently incarcerated in the Federal Penitentiary, Lewisberg, Pennsylvania solely on the basis of the sentence of Judge Duffy.

On or about September 22, 1976, the appellant petitioned the District Court for relief pursuant to 28 U.S.C. §2255 alleging that at the time of acceptance of his plea, he was not accorded his rights pursuant to F.R.Cr.P. 11(7a), in that the Court had not advised him of the mandatory special parole, its nature or the fact that he was not eligible for parole at the time of sentencing.

On November 12, 1976, without awaiting the submission of answering papers on the part of the government and without conducting an evidentiary hearing the Court denied the petition (5a). A notice of appeal was timely filed (2a,3a).

ARGUMENT

POINT I - AT THE TIME OF THE ACCEPTANCE OF THE PLEA, THE COURT FAILED TO PROPERLY COMPLY WITH RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As will be demonstrated below, the appellant was unquestionably denied his rights pursuant to F.R.Cr.P. 11 as it then read. In 1974 the rule required that:

> "A defendant may plead not guilty, guilty or, with the consent of the court, Nolo Contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of Nolo Contendere without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the plea . . ." (Emphasis added.)

The United States Supreme Court has established a stringent penalty for non-compliance with Rule 11:

> ". . . a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." McCarthy v. United States, 394 U.S. 459, 463-464, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

It is thus rather evident that if the judge accepting appellant's plea failed to comply with Rule 11, he must be permitted to withdraw his plea and replead.

At the time of the acceptance of the plea, the court was aware of this requirement and advised the appellant:

> "Before I can accept a plea of guilty, it is necessary for me to be sure that you are acting voluntarily, with a complete understanding of your rights, and that you understand the consequences of your plea and that in fact you are guilty." (14a-15a) (Emphasis added.)

During the plea, the only consequences the appellant was advised of were that he faced possible incarceration for 15 years (30 if a second offender information was filed), and a fine of $25,000 (16a-17a). The record is barren of any further advice to the appellant as to the "consequences" of his plea. The appellant was not advised of the following consequences of his plea:

1. that he would be liable to the mandatory special parole at the end of his term of imprisonment (21 U.S.C.§§841(a)(1) and 841(b)(1)(a);*
2. that he could be subject to further incarceration under the special parole term over and above the sentence of incarceration imposed by the sentencing court; and
3. that he was ineligible for immediate parole in that he was obligated to serve a minimum mandatory sentence (21 U.S.C. §§173 and 174).

This Court has held that where special parole is to be imposed, the defendant must be advised of such a sentence at the time of the entry of his plea and must be asked if he understands this. Michel v. United States, 507 F.2d 461, 463 (2nd Cir. 1976). Indeed Michel determined that such a sentence was a consequence of the plea as defined by Rule 11. In the case of United States v. Foddrell, S73 Cr. 229,

* In light of this, the nature of special parole was obviously not explained to the appellant. This, too constitutes a failure of the court to advise appellant of the "consequences" of his plea.

Memorandum Decision #42279, decided April 17, 1975, Judge Gagliardi of the Southern District of New York determined that although Foddrell was advised of the imposition of special parole, the failure of the court to ask if he understood this fact was fatal to the plea. The instant case is even more egregious in that the appellant was not even advised that a special parole term had to be imposed.

Both the Eighth and Third Circuits have held that the acceptance of a guilty plea obligates the court to explain to a defendant the particular effects of special parole to which the defendant is necessarily exposed, or permit him to replead. United States v. Richardson, 483 F.2d 516 (8th Cir., 1973); Roberts v. United States, 491 F.2d 236 (3rd Cir. 1974). Indeed, this Circuit has also determined that the failure of a court to advise a defendant of such consequences mandates repleading. Irizarry v. United States, 508 F.2d 960 (2nd Cir. 1974); Ferguson v. United States, 513 F.2d 1011 (2nd Cir. 1975). The controlling factor is the transcript of the plea (Ferguson v. United States, supra), and failing such evidence of compliance, the plea is void. The transcript of the appellant's plea is devoid of such compliance.

In the instant case not only was the appellant not informed of the nature of special parole, but he was not even advised that such a sentence had to be imposed (Michel v. United States, supra). The Comprehensive Drug Abuse Prevention and Control Act mandates that the court advise the defendant

of the mandatory term of special parole before accepting a defendant's plea (21 U.S.C. §§401(b)(1)(B) and 841(b)(1)(B)). As is evident from the transcript, there was no compliance with either the statutory or decisional safeguards and requirements.

The facts as presented herein vividly demonstrate that the appellant was neither advised of the necessary imposition of special parole or the terms thereof. Under the authority of McCarthy v. United States, supra, and Michel v. United States, supra, his plea must be vacated. It is of no moment that the Michel decision came after the appellant's plea, as Michel is retroactive. Ferguson v. United States, supra. As the special parole term added to the sentence of the appellant, he had to be advised of it:

> ". . . the maximum possible sentence is a 'consequence' within the meaning of Rule 11 and . . . a guilty plea cannot be accepted under that rule unless the court determines that the defendant is aware of the maximum penalty for the offense." Jones v. United States, 440 F.2d 466, 468 (2nd Cir. 1971).

In the face of this overwhelming authority, the court below did not even consider the appellant's arguments concerning special parole to be of any moment and dismissed them as being "without merit." (6a).

In the court below, the appellant raised the further issue that the court had failed to advise him of the existence of a mandatory minimum term of imprisonment. Although the court candidly admitted that it "may be that I did not advise the defendant [appellant] of the minimum sentence

possible" (5a), the court stated that since probation was never considered, the failure to advise the appellant of the mandatory minimum did not vitiate the plea. This is in direct contravention with the overwhelming authority in this and other circuits. In Berry v. United States, 412 F.2d 189 (3rd Cir. 1969), the court determined that because the

> "mandate of . . .[Rule] 11, before and after the 1966 amendment, is designed to insure that the pleader is made aware of the outer limits of punishment,"

knowledge of a defendant's ineligibility for parole is necessary to an understanding of the consequences of a plea of guilty. Berry was determined under the rationale that:

> "[w]hen one enters a plea of guilty he should be told what is the worst to expect. At the plea he is entitled to no less - at the sentence he should expect no more." Berry v. United States, supra, at 192.

Eight circuits have determined that under the Rule 11 "consequence" theory, the ineligibility of a defendant to be admitted to parole must be explained to him to comply with the rule, and a failure to do so requires that the defendant be entitled to plead anew. Durant v. United States, 410 F.2d 689 (1st Cir. 1969); Bye v. United States, 435 F.2d 177 (2nd Cir. 1970); Berry v. United States, supra; Harris v. United States, 426 F.2d 99 (6th Cir. 1970); United States v. Smith, 440 F.2d 521 (7th Cir. 1971); Moody v. United States, 469 F.2d 705 (8th Cir. 1972); Munich v. United States, 337 F.2d 359 (9th Cir. 1964); Jenkins v. United States, 420

F.2d 433 (10th Cir. 1970). Not only does the law of this Circuit mandate a reversal, but such a determination would be keeping in line with nationwide authority on this issue.

Although this Court is required to apply Rule 11 as it was composed at the time of the entry of appellant's plea, Turner v. United States, 456 F.2d 1022 (3rd Cir. 1972), an examination of Rule 11 as it presently exists indicates that the case law of the past has become the present rule:

> "Before accepting a plea of guilty or Nolo Contendere, the court must address the defendant personally in open court and inform him of and determine that he understands the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum provided by law, if any, and the maximum possible penalty provided by law; . . ." F.R.Cr.P. 11(c)(1). (Emphasis added.)

It is evident that under either the prior Rule 11 and case law, or the present Rule 11, the appellant must be permitted to withdraw his plea and plead anew.

POINT II - THE LOWER COURT ERRED IN DENYING THE APPLICATION WITHOUT CONDUCTING A HEARING OR AT LEAST AWAITING THE GOVERNMENT'S RESPONSE.

Unquestionably the appellant, in asserting that he was unaware of his rights at the time of the entry of the plea, was permitted to move pursuant to 28 U.S.C. §2255 for the necessary relief. DeLeon v. United States, 355 F.2d 286 (5th Cir. 1966). The law is clear that unless it can be conclusively determined from the papers submitted on behalf of the motion that the petition is without merit, an evidentiary hearing must be granted. Christinzio v. United States, 464 F.2d 925 (3rd Cir. 1972); United States v. Valenciano, 495 F.2d 585 (3rd Cir. 1974). Indeed, the statute itself mandates such a procedure upon an application under 28 U.S.C. §2255. However, the Supreme Court has determined that when such an application is employed to allege a violation of Rule 11, not even an evidentiary hearing is required once a violation has been demonstrated. McCarthy v. United States, supra, at 468-469.

In the instant case, despite the clear inadequacy of the plea, the lower court rejected appellant's claim without awaiting the government's response (2a), or directing an evidentiary hearing, which, although rejected as insufficient by the Supreme Court in McCarthy, was the procedure suggested by the government. Thus the District Court totally ignored both the established, accepted procedures as well as the appellant's rights. The lower court admitted a failure

to vindicate the appellant although he had served his full time under the previously imposed sentence and remains incarcerated due only to the invalid plea. As the Supreme Court held in McCarthy, supra, at 471-472:

> "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require, that before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking."

Clearly this admonition was not followed in the instant case.

CONCLUSION

For the aforementioned reasons, it is respectfully requested that the order of the District Court be reversed and the case be remanded to the District Court with orders to permit the appellant's plea to be withdrawn and he be permitted to replead, and immediately be released on bail pending further action under Indictment No. 73 Cr. 1099.

Dated: New York, New York
January 7, 1977

Respectfully submitted,

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